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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California  
corporation,

Plaintiff

v.

RAPIDSHARE A.G., a corporation;  
CHRISTIAN SCHMID; BOBBY  
CHANG; and DOES 1 through 100,  
inclusive,

Defendants.

Case No.: CV 09-2596 H WMc

**PERFECT 10'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO RAPIDSHARE'S  
MOTION FOR PROTECTIVE  
ORDER**

DATE: TBA

TIME: TBA

CTRM: C

JUDGE: Hon. William McCurine, Jr.

DATE FILED: November 18, 2009

TRIAL DATE: None Set

1  
2 **I. INTRODUCTION**

3 Defendant RapidShare A.G. (“RapidShare”) seeks entry of a protective order  
4 that includes a Trial Counsel Eyes Only (“TCO”) provision. It also requires Plaintiff  
5 Perfect 10, Inc. (“Perfect 10”) to advise RapidShare when it is providing its consultants  
6 TCO materials. See Proposed Protective Order (“Order”), ¶¶ 4, 5. The Order suffers  
7 from three major infirmities.

8 First, it fails to recognize that Judge Huff’s May 17, 2010 Order (Doc. No. 66)  
9 denying RapidShare’s motion to designate materials as Trial Counsel Only (“TCO”)  
10 dispenses with the notion that a TCO designation is appropriate in this action. In the  
11 Order, the Court recognized Dr. Norman Zada as a party with “a unique significance to  
12 the prosecution of the case.” She also ruled that “Dr. Zada should have access to all  
13 material,” without qualification. Judge Huff’s May 17 order effectively modified  
14 Judge McCurine’s order and allowed Dr. Zada to see material that had already been  
15 ruled as TCO, as well as all future material, whether designated TCO or not.

16 Second, even if a TCO designation were to be considered, the procedure set  
17 forth in the proposed protective order unfairly burdens the non-designating party with  
18 unwinding the designation through a noticed motion. Considering the unlikelihood  
19 that such a TCO designation will ever be warranted, any burden to designate materials  
20 as TCO must be borne by the designating party.

21 As previously explained and recognized by Judge Huff, Dr. Zada is a party that  
22 has a “unique significance” to this litigation and has never previously violated a  
23 confidentiality order. Thus, allowing RapidShare the ability to deprive him of  
24 materials simply by unilaterally designating a document as TCO without prior Court  
25 approval is an assault on the attorney-client relationship.

26 Furthermore, paragraphs 4 and 5 of the Order require Perfect 10 to alert  
27 RapidShare each time it is communicating a TCO designated document to one of its  
28 consultants, which is violative of the attorney work product doctrine.

1 Finally, RapidShare is continuing to attempt to smear Dr. Zada, and has once  
2 again wrongly accused Dr. Zada of making incorrect statements to a reporter, in an  
3 attempt to unduly influence the Court. Judge Huff already considered these bogus  
4 accusations and concluded that Dr. Zada was entitled to review all documents. If  
5 anyone's credibility should be questioned, it is RapidShare's. On May 19, 2010,  
6 Senator Orin Hatch and the Congressional Anti-Piracy Caucus identified RapidShare  
7 as being one of the world's six priority infringing websites that must be dealt with to  
8 protect United States intellectual property. RapidShare founder and CEO Christian  
9 Schmid subsequently criticized the U.S. Congress for its characterization of  
10 RapidShare as a "notorious" illegal website. Dr. Zada has no intention violating any  
11 protective orders. See Declaration of Dr. Norman Zada ("Zada Decl.") attached  
12 hereto.

13 Perfect 10 respectfully requests that the Court enter Perfect 10's proposed  
14 protective order, lodged herewith, or alternatively, a protective order that does not  
15 include a TCO designation and allows Dr. Zada to see materials so designated. (A  
16 comparison document, which allows the Court to easily compare the competing  
17 versions is attached to the Declaration of Jeffrey N. Mausner filed hereto, Exh. 1.) If  
18 the Court is inclined to include a TCO designation provision, the provision must be  
19 drafted to require the designating party to obtain Court approval prior to the  
20 designation. Furthermore, paragraphs 4 and the reference to it in paragraph 5, which  
21 allow RapidShare to monitor communications between Perfect 10 and its consultants  
22 must be stricken.

## 23 **II. ARGUMENT**

### 24 **A. The Court's May 17, 2010 Ruling Precludes Rapdishare From Using** 25 **TCO Designations In This Action**

26 On May 5, 2010, in support of its reply briefs in support of its motions to  
27 dismiss, Rapidshare filed a motion to designate certain materials as "Confidential" and  
28 a subset of those documents as "Confidential – Trial Counsel's Eyes Only." (Doc. No.

38.) On May 17, 2010, the Court granted the motion to designate the materials “Confidential,” but denied the motion to designate certain materials as “Confidential – Trial Counsel’s Eyes Only.” The Court ruled:

Defendants seek to keep certain material out of the hands of Dr. Norman Zada, President of Perfect 10. The Court concludes that Dr. Zada is a party who has a unique significance to the prosecution of the case. Absent evidence that Dr. Zada has failed to comply with Court orders regarding confidentiality, **Dr. Zada should have access to all material.** (Emphasis added).

(Doc. No. 66.) Judge Huff came to this conclusion after reviewing extensive briefings, including numerous declarations submitted by Dr. Zada in three hotly-contested motions, which culminated in a three-hour court hearing on May 12, 2010. Magistrate Judge McCurine did not have the benefit of analyzing these extensive briefs in which Dr. Zada’s integral involvement in this litigation was demonstrated.

While Rapidshare implies that the Court’s ruling only applies to the materials sought to be designated in its second motion of May 5, 2010 (Defs. Brf. 6: 8 – 10), the Court’s findings apply to the litigation in general. For example, the Court did not state that Dr. Zada needed access to the specific materials at issue in that motion, but rather, concluded that Dr. Zada is significant *to the prosecution of the case*. Furthermore, the Court indicated that Dr. Zada should be entitled to review **all material** unless he was found to have violated a court order. Unless and until that occurs (which it never will), a procedure for TCO designations is unwarranted.

In fact, Judge Huff effectively overruled (at least partially) Magistrate Judge McCurine’s May 5, 2010 order that had granted RapidShare’s request to designate as TCO, certain items filed in support of RapidShare’s opposition to Perfect 10’s Preliminary Injunction motion. (Doc. No. 39). RapidShare’s May 5, 2010 Motion (Doc. No. 38) sought TCO designation of materials that Magistrate Judge McCurine had previously ordered to be designated TCO. *See*, RapidShare’s Points and Authorities in Support of its May 5, 2010 Motion for Leave to File Documents Under

1 Seal (Doc. No. 38-1), p. 4, ln 19 - 21 (explaining that one of the items in question  
2 “pertains to information that has already been ordered sealed pursuant to Magistrate  
3 Judge McCurine’s order of May 4, 2010.”) When Judge Huff entered her May 17,  
4 2010 order denying all TCO designations after reviewing the substantial briefings, she  
5 apparently concluded that the TCO designations approved by Magistrate Judge  
6 McCurine were unwarranted.

7 **B. The Proposed Protective Order Unfairly Burdens The Non-**  
8 **Designating Party**

9 RapidShare’s proposed Order references mutual obligations and duties. But it is  
10 Rapidshare, not Perfect 10, that will designate materials as TCO. Therefore, the  
11 protective order must be read with the understanding that the burdens and obligations  
12 of the non-designating party will likely fall on Perfect 10.

13 The proposed Order allows Rapidshare to designate materials as TCO without a  
14 court order. (Order, ¶ 1.) In order to challenge the designation, Perfect 10 would be  
15 required to meet and confer with Rapidshare within 10 days and if the parties could not  
16 resolve their differences, it would be forced to file a noticed motion to change or  
17 remove the designation. (Order, ¶ 17.)

18 This process is unworkable. First, between the meet and confer process and a  
19 28-day noticed motion period (not to mention time to draft the motion), Perfect 10 will  
20 be hamstrung in its effort to litigate for at least 30 days. As history shows, these  
21 designations are often made in documents filed in support of or in opposition to  
22 motions. By the time the TCO motion is heard, the underlying motions containing the  
23 TCO designations will be fully briefed and submitted. In other words, Dr. Zada will be  
24 precluded from fully participating as a result of Rapidshare’s unilateral decision to  
25 designate materials as TCO for 30 days regardless of the outcome of the motion to  
26 challenge the designation.

27 Second, it will be difficult to challenge Rapidshare’s TCO designation unless  
28 Perfect 10 fully understands the reasons for the designation. Requiring Perfect 10 to

1 initiate the process by a noticed motion without an understanding of Rapidshare's  
2 bases for the TCO designation is illogical. Rapidshare must be required to present an  
3 explanation as to why such materials are so sensitive that not even the opposing party  
4 can view it.

5 Perfect 10 requests that to the extent a TCO designation is to be included in the  
6 Order, the designating party be required to obtain Court approval prior to the  
7 designation.

8 **C. Paragraph 4 of the Proposed Order Violates the Attorney Work**  
9 **Product Doctrine**

10 If the Court accepts the TCO designation, Paragraph 4 (and the reference to it in  
11 paragraph 5) must nevertheless be stricken as unreasonable and violative of the  
12 attorney work-product doctrine. In sum, Paragraph 4 precludes Perfect 10 from  
13 sharing TCO materials with its consultants unless Perfect 10 first (i) notifies  
14 RapidShare of the name of the consultant and his or her employer and relationship to  
15 Perfect 10 (§ 4(a)), and (ii) discloses to RapidShare, the precise materials to be  
16 disclosed (§ 4(b)). If RapidShare objects, Perfect 10 may not make the disclosure  
17 without first obtaining a court order.

18 These conditions violate the attorney work-product doctrine in that they require  
19 Perfect 10's attorneys to divulge to RapidShare their mental impressions, conclusions,  
20 opinions, or legal theories concerning the litigation. Fed. R. Civ. P., Rule 26(b)(3)(b).  
21 For example, Perfect 10 may retain a consultant regarding computer systems to assist it  
22 in developing theories underlying RapidShare's defenses that it does not upload  
23 copyrighted materials. By forcing Perfect 10 to divulge its retention of the consultant  
24 and the types of documents provided to the consultant, RapidShare will unfairly gain  
25 access to opposing counsel's mental impressions, conclusions, opinions and legal  
26 theories.

**D. RapidShare's Smear Campaign of Dr. Zada Should Be Disregarded**

Despite the fact that the Court determined that Dr. Zada is entitled to review all documents unless RapidShare produces evidence of a violation of protective order, RapidShare nevertheless continues to smear Dr. Zada based upon claims that RapidShare knows to be untrue, regarding supposed statements to a reporter, and which have already been fully briefed and considered by the Court. *See* Reply Declaration of Dr. Norman Zada in Support of Perfect 10, Inc.'s Motion for Preliminary Injunction, ¶ 20 (Doc. No. 43-1.)

In fact, it is RapidShare's credibility that should be questioned, not Dr. Zada's. On May 19, 2010, Senator Orin Hatch and the Congressional International Anti-Piracy Caucus unveiled the 2010 International Piracy Watch List. RapidShare was named as one of the six "priority" websites that is involved in providing access to unauthorized copies of copyrighted works made by U.S. creators. *See* Zada Decl. Ex. 1, p. 1. Christian Schmid, RapidShare's CEO, subsequently criticized the U.S. Congress for its characterization of RapidShare as a notorious illegal website. *Id.* p. 2.

Dr. Zada has no intention of violating any protective orders and recently declined an interview regarding this case. Zada Decl. ¶ 4.

**III. CONCLUSION**

In light of Judge Huff's May 17, 2010 ruling which recognized Dr. Zada as having a unique significance to the prosecution of the case, and which allowed Dr. Zada to see all documents in the case, there is no place for a TCO designation in the protective order. Alternatively, even if a TCO designation provision was necessary, it must be drafted to put the burden on the designating party to obtain court approval prior to the designation. Furthermore, paragraphs 4 and 5 of RapidShare's version of the protective order allow RapidShare to improperly seek to access Perfect 10's attorney's work product.



1 Perfect 10 respectfully requests that the Court enter Perfect 10's proposed  
2 protective order, which addresses the issues raised herein.  
3  
4

5 Dated: May 28, 2010

KRAUSE, KALFAYAN, BENINK & SLAVENS,  
6 LLP.

7 By: /s/ Eric J. Benink

8 Eric J. Benink

9 Attorney for Plaintiff Perfect 10, Inc.

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